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Shelly Hipwell v. Roger Sharp, Tim W. Healy, and Does I through X : Reply Brief

Utah Supreme Court

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BRIEF

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IN THE UTAH SUPREME COURT

SHELLY HIPWELL, an individual by and through her guardians, SHERRY JENSEN and SHAYNE HIPWELL,	)	Case No. 920218
Plaintiffs,	)	Priority No. 11
vs.	)	
ROGER SHARP, TIM W. HEALY, and DOES I through X,	)	
Defendants.	)	

REPLY BRIEF OF APPELLANT TIM W. HEALY

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DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

Utah Constitution, Article I, Sections 7, 11 and 24, attached hereto as Addendum 1. Sections 63-30-3, 63-30-2 and 63-30-34 of the Utah Governmental Immunity Act, Utah Code Ann. §63-30-1, et seq. as they existed in January of 1989, attached hereto at Addendum 2.

SUMMARY OF THE ARGUMENT

Instead of addressing the critical legal and factual issues that are raised by this appeal, Plaintiffs have gone to great lengths to obfuscate the issues by belaboring factual issues that are irrelevant, raising new legal and factual issues for the first time on appeal, setting forth incorrect

legal standards, and attempting to shift the burden of proof on the constitutionality of the Utah Governmental Immunity Act ("Immunity Act") to Defendants. Defendant Healy will not legitimize Plaintiffs' efforts by responding to each of the inaccurate and irrelevant matters raised, as the factual and legal issues for resolution by this Court have been accurately framed by Defendants.

In this case, Plaintiffs have the burden of proving beyond a reasonable doubt that the damage limitation of the Immunity Act is unconstitutional. Plaintiffs have not met their burden. The prior decisions of this Court clearly establish that the State and its agencies could not be sued in tort at common law without consent. Accordingly, because Plaintiffs would have had no right of action against the University Hospital at common law, the Immunity Act (which now gives injured persons a right to sue and to recover limited damages) does not violate the open courts, due process and equal protection provisions of the Utah Constitution.

Plaintiffs have also failed to establish that they would have been able to assert a medical malpractice action against a doctor employed at a governmentally-owned hospital at common law. In addition, even if such an action were available at common law, the remedies provided by the Immunity Act are greater in scope and reliability than pre-Immunity Act remedies and, as a result, the Immunity Act does not violate the open courts provision as it provides reasonably equivalent substitute remedies.

Finally, and most importantly, Plaintiffs have failed to establish that the 1987 version of the Immunity Act violates the due process and equal protection provisions of the Utah Constitution.

ARGUMENT

I. THE DAMAGE LIMITATION PROVISION OF THE IMMUNITY ACT DOES NOT VIOLATE THE OPEN COURTS PROVISION OF THE UTAH CONSTITUTION.

Plaintiffs acknowledge that the open courts provision of the Utah Constitution is not violated if the claim that Plaintiffs wanted to assert against the University Hospital was not available at the time the Utah Constitution was adopted. In order to implicate the open courts provision, Plaintiffs argue that an injured party could have asserted a tort action against a governmentally-owned hospital at common law. Alternatively, Plaintiffs argue that at common law an injured party could have asserted a tort action against a doctor-employee of a governmentally-owned hospital and that the Immunity Act has eliminated that right of action without providing a reasonably equivalent substitute remedy. For the reasons set forth below, Plaintiffs' arguments have no merit.

A. The Prior Decisions of this Court Clearly Establish that the State and State Agencies Could Not be Sued in Tort Without their Consent at Common Law, and Plaintiffs Have Not Produced a Valid Factual or Legal Argument to the Contrary.

There is no dispute that the University Hospital is an agency of the State of Utah. Defendants have cited numerous prior decisions of this Court holding that prior to the 1965 enactment of the Immunity Act, the State and its agencies could not be sued without their consent. Plaintiffs have not cited one Utah case that disputes or contradicts this fundamental principle of law. In fact, Plaintiffs recognize the validity of this legal principle in their

argument. Plaintiffs claim that the reason that the State and its agencies could not be sued at common law was because the State "only performed governmental functions," and that prior to the ratification of the Utah Constitution, the State did not perform any activity that was "even remotely proprietary in nature." (Appellees' Brief at 19). Plaintiffs have cited no legal or factual authority for this proposition, and to the contrary, the prior decisions of this Court establish that there was no exception to the principle of law holding that the State and its agencies could not be sued without consent.

In Wilkinson v. State, 134 P. 626 (Utah 1913), the plaintiff sued the State, the state board of land commissioners, the individual members of the board, the state engineer and his assistant for damages resulting to his property from flood waters carried by a canal engineered, constructed and owned by the State. After a non-jury trial, the trial court entered a nonsuit in favor of the State, the board of land commissioners and the individual members of the board. The trial court entered judgment against the state engineer and his assistant, and they appealed. On appeal, the defendants argued that the action was really an action against the State, and because the State had not consented to suit, the action could not be maintained. In addressing this argument, this Court stated:

> We shall first take up the question of whether appellants were suable in the courts of this state. We have neither a statute nor a constitutional provision authorizing a suit against the state. Respondent's counsel do not in terms contend that an action against the state can be maintained, but what they contend is that this action is not against the state. We cannot conceive how counsel can seriously make such a claim, since the very judgment they seek to uphold requires that it be paid out of the funds belonging exclusively to the state. . . . The action therefore was

> in fact against the state in whatever form it may have been commenced, and in the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained. The doctrine is elementary and of universal application, and so far as we are aware there is not a single authority to the contrary.

Id. at 630 (emphasis added). From Wilkinson, it is clear that an action could not be maintained against the State without consent and, that this rule of law could not be circumvented by filing an action against state employees or state agencies.

The opinion in Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857 (Utah 1937) also supports this principle. There, Campbell and the State entered into a contract for the construction of a highway. During the course of the contract, Campbell performed certain extra work for which it was not paid. Campbell sued the State to recover for the extra work. Although this Court found that the action was an action against the State, it also found that a statutory waiver allowing suit existed. The issue for resolution was, therefore, the scope of the statutory waiver. The State took the position that the statutory waiver merely allowed actions for specific performance. In addressing this issue, this Court stated:

> It may be helpful in determining what is within the scope of the statute to consider what is clearly not within the orbit of its operation. It is undoubtedly true that the waiving of immunity from suit does not of itself create any new liability against the state or prevent it from setting up any defense it may have to the suit. Consent to be sued on certain contracts has certainly not opened the door to liability on account of the negligence or misconduct or willful conduct or unauthorized acts of officers or agents of the state. There is no permission for a suit on account of a tort.

Id. at 862 (emphasis added).

Because the law clearly held that the State and its agencies could not be sued without consent, plaintiffs began to search for possible exceptions. In Bingham v. Board of Education, 223 P.2d 432 (Utah 1950), the plaintiff attempted to argue that the principle of law that protected the State and its agencies from tort liability did not apply where the conduct complained of constituted a nuisance. There, a three-year old child was severely burned when she fell into an incinerator maintained on the school grounds of a public school for the purpose of disposing of books, papers, rubbish, etc. The trial court dismissed the complaint based upon a general demurrer. On appeal, this Court held that because the facts alleged only ordinary negligence, the demurrer was proper. This Court also reviewed the principle of governmental immunity in responding to plaintiff's argument that the general rule should not apply because the conduct constituted a nuisance. In doing so, this Court noted that the cases relied upon by plaintiff involved municipal corporations and after noting the difference in the immunity afforded municipal corporations, declined to incorporate those differences when the conduct at issue was performed by an agency of the State:

> While law writers, editors and judges have criticized and disapproved the foregoing doctrine of governmental immunity as illogical and unjust, the weight of precedent of decided cases supports the general rule and we prefer not to disregard a principle so well established without satisfactory authority. We, therefore, adopt the rule of the majority and hold that school boards cannot be held liable for ordinary negligent acts.

Id. at 435 (emphasis added). Accordingly, this Court in Bingham continued to uphold the general principle precluding suits against the State and its agencies without consent, and also

explicitly recognized that the immunity afforded the State and its agencies was full and complete while the immunity afforded municipalities was subject to exceptions.

Plaintiffs suggest that Bingham supports their argument that the proprietary/governmental distinction was applied at common law to suits against the State and its agencies. However, Bingham did not discuss the proprietary/governmental distinction even though the conduct complained of had nothing to do with the governmental function of providing education. The conduct complained of involved the disposal of trash, and although performed by a state agency, was clearly conduct of a proprietary nature. This Court's failure to even mention the proprietary/governmental distinction illustrates that the proprietary/governmental distinction applied to municipalities was not applied to the State and its agencies.

Campbell v. Pack, 389 P.2d 464 (Utah 1964) was the last case to address this general principle before the Immunity Act was passed into law. In that case, this Court noted that courts from other jurisdictions had changed the general rule, but stated:

> With due deference to the authorities cited, and the reasoning set forth by them, we are not persuaded of the propriety of judicially changing this rule, which is adhered to by a majority of our sister states. It has always been the law of this state and the activities, operations and contracts of the state government and other public entities protected by it are based upon that understanding of the law. For the reasons set forth in the cases heretofore decided by this court referred to above, we believe that if there is to be a change which would have such an important effect upon public institutions and their operations, it should be left entirely to the legislature to determine whether the immunity should be removed; and as to what agencies; when effective, and to what extent, if any, limitations should be prescribed.

Id. at 465 (citations omitted; emphasis added).

These cases clearly establish that the principle of law that precluded suits against the State and its agencies absent a specific statutory waiver was upheld and enforced at all times prior to the Immunity Act. Plaintiffs have not cited and counsel for the Defendants have been unable to find a case from this Court applying the proprietary/governmental distinction or any other exception to this general rule.[1] Accordingly, Plaintiffs' argument that the proprietary/governmental distinction recognized and applied by this Court with respect to municipalities was also recognized and applied to the State and its agencies is without legal and factual support. The prior decisions of this Court clearly establish that at common law and at all times prior to the Immunity Act, the State and its agencies were not subject to suit absent consent. Because there was no right of action against the State and its agencies at common law, the Immunity Act (which gives persons injured by the tortious conduct of the State and its agencies the consent necessary for suit to be maintained and to recover damages subject to the damage limitation) does not violate the open courts provision of the Utah Constitution.

B. The Immunity Act Provides a Reasonably Equivalent Substitute Remedy for any Eliminated Causes of Action.

Plaintiffs argue that the Immunity Act precludes negligence actions available at common law against individual health care providers at the University Hospital, and that the substitute remedy of an action against the State with a damage limitation is not a reasonably equivalent substitute remedy. This argument was not raised by Plaintiffs before the trial court and should

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[1]*The cases from other jurisdictions cited by Plaintiffs for the proposition that the proprietary/governmental distinction was applied as to states and state agencies should not even be considered by this Court in light of the clear Utah precedent on this issue. Even if considered, the cases support the Defendants' position and are in fact contrary to Plaintiffs' argument. See Reply Brief of Appellant Roger Sharp at Section A.1.*

not be considered by this Court for the first time on appeal. See Reply Brief of Appellant Roger Sharp at Section B.

If the Court decides to address this issue, the Court should recognize that Plaintiffs have focused solely on the Immunity Act and its application to the University Hospital, and have assumed without authority or discussion, that they would have had a claim at common law against the medical intern who operated on Ms. Hipwell. The arguments set forth at pages 6-16 of the Brief of Intervenor State of Utah adequately respond to these arguments and will not be restated by Defendant Healy. More importantly, this Court should not limit its focus to the circumstances of the University Hospital. The Immunity Act addresses the totality of governmental activity in the State and not simply the activity of the University Hospital. As a result, this Court should look at the Immunity Act as a whole in resolving these important issues.

Prior to the Immunity Act, the State and its agencies were absolutely immune from all liability absent specific statutory consent. Non-state governmental entities, on the other hand, were immune from liability arising from the performance of governmental functions and were subject to suit for liability arising from the performance of proprietary functions. State and non-state governmental employees, although not absolutely immune, were able to avoid individual liability and in essence invoke the immunity of the State and of municipalities in various circumstances. See, Wilkinson v. State, 134 P. 626 (Utah 1913); see also, discussion concerning discretionary/ministerial function distinction applied to governmental employees at pages 6-11 of the Brief of Intervenor State of Utah.

The initial 1965 version of the Immunity Act made the following significant changes to governmental immunity. First, it eliminated the absolute immunity enjoyed by the State and its agencies, subject to a damage limitation determined by the amount of available insurance coverage, with governmental agencies required to have minimum limits of $100,000 per person/ $300,000 per occurrence. See, U.C.A. §63-30-34 (1965); and U.C.A. §63-30-29(a) (1965). Subsequent amendments to the Immunity Act have increased the damage limitation from $100,000/$300,000 to $250,000/$500,000. See, U.C.A. §63-30-34. Second, the immunity of non-state governmental entities was also reduced in scope and made subject to the same damage limitation. Finally, although the initial version of the Immunity Act did not eliminate common law remedies against governmental employees (see, U.C.A. §63-30-20 (1965)), subsequent amendments to the Immunity Act have eliminated some common law rights against governmental employees while preserving the right to maintain actions against governmental employees for fraudulent or malicious conduct. See, U.C.A. §63-30-4(4).

The net effect of the Immunity Act is that persons injured due to the tortious conduct of the State and its agencies now have a remedy (subject to specific reservations of immunity and the damage limitation) against the State and its agencies where no remedy previously existed. In addition, persons injured by the tortious conduct of non-state entities arising out of the performance of governmental functions now have a remedy (subject to specific reservations and the damage limitation) against non-state entities where no remedy previously existed. These new remedies are the substitute for sometimes available previously existing remedies against governmental employees for liability arising from their negligent conduct. On the whole, a

comparison of the scope of available remedies before the Immunity Act with those available under the Immunity Act reveals that the remedies allowed for and provided under the Immunity Act are not only reasonably equivalent to the remedies that existed at common law, but in fact are greater in scope than the remedies available at common law.

Not only is the scope of available remedies greater under the Immunity Act than prior to the Immunity Act, but the potential for reliable and meaningful recovery is also greater. At common law, a person injured by the tortious conduct of a state employee could only obtain recovery from the state employee. However, as set forth above, in many circumstances state employees also enjoyed the immunity afforded to the State and its agencies. In those circumstances where immunity was not available, although the injured person was permitted to obtain an unlimited judgment, the injured person's ability to collect the judgment was always limited by the assets of the state employee and by the possibility that the state employee would file bankruptcy and obtain a discharge of the liability. These two problems are the likely reasons why, at common law, plaintiffs were always looking for ways to assert claims that could be collected from the coffers of the State. The Immunity Act eliminates these two problems by reducing the immunity afforded to governmental entities and by allowing injured persons to obtain judgments directly against governmental entities.

The Immunity Act has clearly expanded the conduct for which governmental entities may be sued and in doing so has provided a realistic means for the recovery of damages by injured persons. Although the Immunity Act retains some areas of immunity and limits the damages recoverable in circumstances where immunity is waived, the Immunity Act, on the whole, allows

a greater number of injured persons to sue governmental agencies and to obtain actual recovery for their legitimate injuries. As a result, the Immunity Act does provide a reasonably equivalent substitute remedy for any prior remedy eliminated by the Immunity Act.

II. THE DAMAGE LIMITATION, AS ENACTED BY THE ORIGINAL VERSION OF THE IMMUNITY ACT AND AS IT EXISTS UNDER THE 1987 VERSION, IS CONSTITUTIONAL.

A. The Immunity Act's Damage Limitation Does Not Create "Suspect Classes" and Does Not Impact on the Exercise of Fundamental Rights and, as a Result, This Court Should Not Apply the Heightened Scrutiny Standard In Its Constitutional Analysis.

Plaintiffs suggest that this Court should apply the heightened scrutiny standard in resolving the due process and equal protection issues presented by the 1987 version of the Immunity Act. However, Plaintiffs have not cited a legitimate factual or legal basis supporting this argument. Heightened scrutiny is required where a statute violates a fundamental right or creates a suspect class. Greenwood v. City of North Salt Lake, 817 P.2d 816, 820-21 (Utah 1991). However, heightened scrutiny is not appropriate where a fundamental right is not implicated or in every situation where legislation treats people differently. Where a statutory classification is created, "the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

Plaintiffs do claim that the Immunity Act's damage limitation establishes two classes of people: those who incur damages due to the conduct of the State in a sum less than the damage limitation and those who incur damages due to the conduct of the State in excess of the damage

limitation. However, Plaintiffs have not and cannot suggest that such classifications constitute "suspects classes" requiring application of the heightened scrutiny standard. Instead, Plaintiffs continue to argue that the Immunity Act eliminates a fundamental right and that for this reason, the heightened scrutiny standard should be applied.

The cases cited by Defendants establish that persons injured by the conduct of the State and its agencies have not historically had the right to sue the State and to collect judgment. In Utah, that right did not exist until it was granted by the Legislature in 1965. In addition, that right, when granted, was subject to a damage limitation. As a result, Plaintiffs have failed to establish that injured persons have a fundamental right to sue the State and its agencies and to collect unlimited judgments. Because the Immunity Act does not create "suspect classes" or impact the exercise of a fundamental right, the heightened scrutiny standard should not be applied.

B. The Clear Majority of Courts Which Have Considered the Constitutional Implications of Governmental Immunity and Damage Limitations Have Found Them To Be Constitutional.

Collectively, Defendants have cited close to twenty cases from twenty jurisdictions addressing the due process and equal protection issues. These cases have all held that governmental immunity statutes with damage limitations do not violate due process and equal protection. Plaintiffs have not even attempted to distinguish the cases cited by Defendants and have cited only one case, from the State of North Dakota, in support of their position. However, Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) is clearly distinguishable. Arneson

did not involve a governmental entity and did not involve governmental immunity. Rather, Arneson involved a damage limitation statute applicable to private health care providers.

The clear majority of courts to address these issues have applied the rational basis standard and have found that governmental immunity and damage limitations are rationally related to the legitimate legislative purposes of preserving the assets of government while providing persons injured by the conduct of government with adequate and responsive remedies. Plaintiffs have produced no legal or factual arguments to the contrary, and as a result, have failed to prove beyond a reasonable doubt that the 1987 version of the Immunity Act violates the due process and equal protection provisions of the Utah Constitution.

CONCLUSION

For the reasons previously discussed, this Court should find that the 1987 version of the Immunity Act is constitutional insofar as it limits recovery from the State of Utah and its agencies to $250,000.

DATED this 24th day of December, 1992.

SNELL & WILMER

Thomas L. Kay
Paul D. Newman
Mark O. Morris

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 1992, I served two true and accurate copies of the foregoing **REPLY BRIEF OF APPELLANT TIM W. HEALY** upon the following named persons by depositing said document in the United States mail, postage prepaid, addressed as follows:

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ADDENDUM 1

ARTICLE I

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 11. [Courts open - Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

ADDENDUM 2

63-30-2. Definitions.

As used in this chapter:

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function , or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

* * *

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

* * *

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursinghome, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

63-30-34. Limit of judgment against governmental entity or employee.

(1) Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.